Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1998

**JAMES E. AKIN, ET AL.**

**Petitioners,**

**vs.**

**ASHLAND CHEMICAL COMPANY, ET AL.**

**Respondents.**

***On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit***

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Assuming the initial pleading alone does not give a party "unequivocal notice" of the removability of the case, does the thirty-day time limit for removing a case to federal court under 28 U.S.C. § 1446(b) nevertheless begin to run if the removing party has specific knowledge of its own activities that makes the case removable?

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Petitioners respectfully pray that based upon significant questions as to the construction and application of a federal removal statute, 28 U.S.C. § 1446(b), stated in the Questions Presented herein, this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.[1]

## OPINIONS BELOW

The Order of the United Stated Court of Appeals for the Tenth Circuit affirming the United States District Courts for the Western District of Oklahoma and the Eastern District of Texas was reported as *Akin v. Ashland Chemical* at 156 F.3d 1030 (10th Cir. 1998) (App. A-1-A-23).

The opinion of the United States District Court for the Eastern District of Texas on removal was reported as *Akin v. Big Three Industries, Inc.* at 851 F.Supp. 819 (E.D. Tx 1994) (App. A-29-A-48).

## STATEMENT OF JURISDICTION

The Order of the United Stated Court of Appeals for the Tenth Circuit affirming the United States District Courts for the Western District of Oklahoma and the Eastern District of Texas was issued on August 31, 1998. The court of appeals had jurisdiction

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[1] The court recently granted certiorari in *Murphy Bros. v. Michetti Pipe Stringing*, No. 97-1909, to determine whether the 30 day limit for removal under 28 U.S.C. § 1446(b) started to run when the defendant received a faxed, stamped copy of the Complaint or when the complaint was formally served. 67 U.S.L.W. 3291, November 3, 1998).

pursuant to 28 U.S.C. § 1291.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441 provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1446 provides:

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, a copy of an amended pleading, motion, order, or other paper from which it may be first ascertained that the case is one which is or has become removable, except the case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after the commencement of this action.

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1442 provides:

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States and division embracing the place where it is pending.

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or any agency thereof, sued in an official capacity for any act under color of such account or on account of any right, title or authority claimed under any Act of Congress for the apprehension of criminals or the collection of the

revenue.

## STATEMENT OF THE CASE

The fundamental question presented by this case is whether the thirty day time limit within which to remove a case from state court to federal court begins to run when the defendant has specific knowledge of the removability of the case even if the initial pleading does not give the removing party "unequivocal notice" of its removability?

## PROCEDURAL BACKGROUND AND THE PLEADINGS

This case was originally filed in the District Court of Jefferson County, Texas, on November 13, 1992, on behalf of 126 plaintiffs against twelve engine manufacturers and chemical suppliers, including General Electric Company ("GE").[2] On December 28, 1992, GE actually received the Petition. On June 16, 1993, the co-defendant Chemical Specialist & Development, Inc., ("Chemical Specialist") filed a Motion for Summary Judgment asserting a government contractor defense to plaintiffs' claims. On

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[2] All of the plaintiffs were civilians employed by the United States Air Force ("AF") at Tinker Air Force Base ("TAFB") and alleged in product liability claims that both the jet engines and parts manufactured by GE and the chemicals manufactured by the defendants and sold to the AF to be used to clean the engines prior to reworking were defectively "designed, formulated, manufactured and marketed", that the products breached warranties of fitness, and that the defendants failed to warn of the dangerous nature of their products.

August 19, 1993, GE filed a Notice of Removal in the United States District Court for the Eastern District of Texas, on the basis that the federal court had federal enclave jurisdiction under 28 U.S.C. § 1331 and that under 28 U.S.C. § 1442(a)(1) GE was a person acting under the authority of the Secretary of the Air Force.

Plaintiffs timely filed a Motion to Remand the case back to state court asserting that no federal enclave jurisdiction was present, that federal officer jurisdiction was absent and that removal was untimely. The defendants objected to the remand and sought transfer of venue to the Western District of Oklahoma. Plaintiffs replied to the objection, asserting that GE also lacked the necessary unanimous consent of its co-defendants. The court conducted a hearing on remand on December 6, 1993.

On February 23, 1994, GE filed a Motion for Leave to file a Third Party Complaint alleging that United States civilian and military personnel were negligent in "failing to exercise reasonable care, skill and faithfulness in following and complying with the maintenance and repair instructions and safety information GE and others provided", negligently failing to "exercise reasonable care, skill and faithfulness in assuring that GE products were handled in a safe and nonhazardous manner" and "negligently failing to implement an appropriate health and safety program."

On March 21, 1994, the Honorable Howell Cobb denied plaintiffs' Motion to Remand and granted the defendants' Motion to Transfer Venue to the Western District of Oklahoma. (reported at 851 F.Supp. 819, App. A-1-A-23) and accordingly issued an order. (App. A-24-A-26). Plaintiffs filed a Motion to Reconsider which was denied and the case was transferred to the Western District of Oklahoma. (App. A-27-A-28).

In the Oklahoma court plaintiffs timely filed a Motion for Remand and Brief on June 29, 1997, again asserting that remand was untimely, that the removing defendants failed to get unanimous consent because of the Motion for Summary Judgment filed by their co-defendant, and that the court lacked jurisdiction under either federal enclave or federal officer grounds. The court denied the Motion to Remand. (App. A-29-A-31).[3]

After transfer, plaintiffs alleged that the defendants failed to warn the AF of the dangers of neurological injury arising from chronic, long-term, low-level exposure to the solvents manufactured and sold by those defendants and that these defendants had reason to know that the AF did not recognize and would not discover this specific hazard.

After all but four of the defendants were either dismissed or settled out, the solvent defendants moved for summary judgment. On December 13, 1996, the court in the Western District of Oklahoma sustained the Motion for Summary Judgment of the remaining defendants, now Respondents, on the grounds that TAFB was a knowledgeable, sophisticated purchaser and that defendants had no duty to warn the AF of hazards that it knew, both general and

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[3] Once in the Oklahoma court, plaintiffs restated their objection to removal **and** jurisdiction in both the Fourth and Fifth Amended Original Complaints:

> The court has determined that there is jurisdiction for this cause of action. However, Plaintiffs disagree and contest jurisdiction of this Court and again request that the case be remanded to the 60th Judicial District Court, Beaumont, Jefferson County, Texas.

specific.

On appeal, the Tenth Circuit Court of Appeals affirmed summary judgment and also affirmed removal, but failed to specifically address the issue of G.E.'s **knowledge** in its analysis of the removal issues. Instead, the court rejected any duty of the defendants to "**investigate**" whether the case is removable. (App. A-38 n.2).[4]

## FACTUAL BACKGROUND ON REMOVAL ISSUE

Since the courts below found the Petition to be ambiguous[5] and the answers to Interrogatories to be dispositive as to timeliness, the key facts bearing on GE's knowledge of the removability of the Texas state Petition include, obviously, the contents of the Original Petition and the Interrogatories GE propounded, and matters outside the state pleadings which include an employee affidavit submitted by

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[4] It is beyond dispute that GE knew **at the time** the Petition was filed that its engines which were manufactured for the Air Force were reworked and repaired by the plaintiff civilian workers at (e.g. within the confines of) TAFB-GE was not required to "inquire" of or research the status, activities or conduct of any opposition or third party.

[5] The Circuit Court agreed with the Texas court that found the Petition's language "at Tinker Air Force Base" in the phrase "while working for the United States" could be either a "geographical modifier, referring to the location of the exposures" or a "durational modifier, describing the time period during which the exposures occurred" and therefore was ambiguous. (App. A-16). The Circuit Court found the Petition to be ambiguous "in that it did not provide unequivocal notice of the right to remove". (App. A7-A-38).

GE, admissions made by GE's counsel at a hearing conducted by the court, and a Third-Party Complaint filed by GE against the United States.

All of this material, taken together, established that GE's knowledge of its own activities at TAFB resolved any purported ambiguity in the Petition as to either the federal enclave or federal agent jurisdiction.[6]

1. The Original Petition: The original Petition was filed on behalf of numerous plaintiffs against 12 defendants-divided into two groups, engine manufacturers and chemical manufacturers. As to GE (and Pratt & Whitney) the Petition alleged that:

> IV.
>
> . . . Plaintiffs would show that all Plaintiffs were exposed to hazardous chemicals, including, but not limited to **cobalt, chromium, cadmium** . . . while working for the United States Air Force at Tinker Air Force Base in Oklahoma City, Oklahoma. . . . **General Electric Company and Pratt and Whitney Company, Inc. provided jet engines to Tinker Air Force Base which were worked on by the above-referenced Plaintiffs. Each Plaintiff listed above was exposed to the dust and fumes of the jet engine parts. These plaintiffs worked on**

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[6] A somewhat cynical view of GE's belated removal would be that it sat on the sidelines while Chemical Specialists tried to win summary judgment on the government contractor defense-the very same defense raised by GE in federal court. (see App. A-9-A-11 for the district court's discussion of GE's colorable government contractor defense as an element of federal officer jurisdiction).

> **the jet engines by grinding, reworking, and being generally exposed to the chemicals produced by the jet engines and jet engine parts. The jet engines emitted a significant amount of cobalt, chromium, and cadmium during the grinding, reworking and otherwise modification of the engines, which were some of the chemicals responsible for these Plaintiffs' damages.** Plaintiffs were also exposed to numerous other hazardous chemicals while **working at the air force base**. (emphasis added).

The state court Petition also alleged that

"Plaintiffs **have been employed at Tinker Air Force base** and were exposed to significant amounts of chemicals." (emphasis added). It also alleged that defendants were:

> . . . negligent in the manner in which they failed to properly test said chemicals before placing them **in the hands of Tinker Air Force Base**; that they were further negligent in failing to warn and instruct **the individuals working at Tinker Air Force Base**, Plaintiffs herein, of the proper way to cope with said chemicals and/or proper way to protect one's body against said chemicals and/or the toxicity of said chemicals and/or means of preventing health effect caused by those chemicals and **working around the chemicals**. (emphasis added)

The Petition also alleged that:

> . . . Defendants were aware of the latent defects in their chemicals **and jet engines. Therefore, this conscious decision to permit** the chemicals and **jet engines to be used by workers at Tinker Air Force Base** without adequate warnings or

> precautions constitutes a wanton, willful disregard of the rights of the Plaintiffs . . . (emphasis added).

2. Interrogatories: Months before removal the defendants served a detailed set of interrogatories on the plaintiffs which were answered on July 16, 1993. (e.g. James Eugene Aiken, attached as Ex. A to GE's Response to Plaintiffs' Motion to Remand). Virtually every interrogatory relating to damage claims was prefaced with "materials you worked with and around at Tinker Air Force Base". For example, in answer to Interrogatory 12(l)(b) (Describe how you came into contact with such materials?), Aiken responded "By working with them at Tinker."; in answer to Interrogatory 32 concerning job duties, Aiken responded that "all duties were performed on base".

There was no variation in any answer to interrogatory and corresponding allegations in the Petition; to the contrary, the answers echoed the allegations of the Original Petition.

3. Employee Affidavit: In an affidavit by Dempsey L. Hodges, a GE employee stationed at Midwest City, Oklahoma, (where TAFB is located) with duties associated with TAFB, attached to GE's Response to Plaintiffs' Motion to Remand, he stated:

> 2. I have been employed by General Electric Company from 3/16/56 to PRESENT. My current title is Manager, CEAE Midwest City Office.
>
> 3. . . . the jet engines manufactured by General Electric Company **which are repaired or maintained at Tinker**, are for military use and **were manufactured by General Electric Company** pursuant to the specifications from the Department of the Air Force **under a contract with**

> **the Secretary of the Air Force or his delegee**. (emphasis added).

4. Hearing on Motion to Remand: At the hearing the court conducted on the pending Motions on December 6, 1993, the court had a revealing colloquy with GE's counsel concerning the Petition's allegations, and made a specific request for the contract GE had with the AF to make the engines.[7] GE counsel's statements established that GE's own long-standing contract activities triggered federal officer jurisdiction.

5. Third-party Complaint: After the hearing but before the court's decision, GE asserted a claim against the United States alleging that the military and civilian personnel at TAFB were negligent in using the defendants' solvents.

From the interrogatories propounded by GE, the employee affidavit, counsel's statements at the hearing and the Third-Party Complaint, it is clear that GE knew at the time the original petition was served on it in December, 1992, that the case was removable under either the federal enclave or federal agent jurisdiction.

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[7] Counsel admitted that nothing in the Petition indicated that any of the alleged exposures occurred at any place other than within the confines of TAFB and asserted that, as the Hodges affidavit reflects, that all of GE's engines was manufactures and the reworking was done under a contract with the Air Force. Despite a renewed request by the Texas court, from the record this contract was never provided to the Court. Minimally, to meet its burden of establishing the propriety of removal in light of GE's professed position, GE should have so provided the contract to the Court before the Texas court ruled. Arguably, this failure acknowledges that the work on its engines performed by plaintiffs was contractually required to be performed at (within the confines) of TAFB.

## STANDARDS APPLICABLE TO REMOVAL

Under 28 U.S.C. § 1441(a), an action brought in state court may be removed by a defendant to a Federal district court if that Federal court would have had original jurisdiction over the action, whether the case could have been originally filed in federal court. *City of Chicago v. Intern. College of Surgeons*, _ U.S. _, 118 S.Ct. 523, 529 (1997), *Rivet v. Regions Bank of LA.*, _ U.S. _, 118 S.Ct. 921, 925 (1998), *De Young v. Lorentz*, 887 F.Supp. 254, 257 (D. Ken. 1995), *Kenro, Inc. v. Fax Daily, Inc.*, 904 F.Supp. 912, 913 (S.D. Ind. 1995), *Cervantes v. Civil Service Com'n*, 99 F.3d 730, 732 (5th Cir. 730), *Barbara v. New York Stock Exchange*, 99 F.3d 49, 53 (2nd Cir. 1996).

Removal is purely statutory and should be construed strictly in favor of state court jurisdiction and against removal. *Frank v. Bear Stearns & Co.*, 128 F.3d 919 (5th Cir. 1998), *Carroll v. United Airlines, Inc.*, 7 F.Supp. 516, (D. N.J. 1998), *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995), cert. den. 116 S.Ct. 174 (1995), *Heckelmann v. Piping Companies, Inc.*, 904 F.Supp. 1257, 1260 (N.D. Okl. 1995), *Barber v. Albertson's, Inc.*, 935 F.Supp. 1188, 1189 (N.D. Okl. 1995) and cases cited therein, *Schlumberger Industries, Inc. v. National Sur. Corp.*, 36 F.3d 1274, 1284 (4th Cir. 1994), *Naef v. Masonite Corp.*, 923 F.Supp. 1504, 1507 (S.D. Ala. 1996), *Rodgers v. Northwestern Mut. Life Ins. Co.*, 939 F.Supp. 1254, 1255 (D. W.Va. 1996), *J.R. Laughead v. Air Dayco Corp.*, 942 F.Supp. 339, 340 (S.D. Tex. 1996), *Kenro, Inc.*, supra, 904 F.Supp. at 913.

In the face of a Motion to Remand, the defendant has the burden of establishing the propriety of removal and this burden extends not only to demonstrating the jurisdictional basis for removal, but also necessary compliance with requirements of the removal statute. *Toumajian v. Frailey*, 135 F.3d 648 (9th Cir. 1998), *Pachecho de Perez v. AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998), *De Young*, supra, 887 F.Supp. at 257, *McCain v. Cahoj*, 794 F.Supp. 1061, f. 1 (D. Ken. 1992), *Laughlin*, supra, 50 F.3d at 873, *J.R. Laughead*, supra, 942 F.Supp. at 340, *Eyal Lior v. Sit*, 913 F.Supp.

868, 874 (D.N.J. 1996), *Westinghouse Electric Corp. v. Newman & Holtzinger*, 992 F.2d 932, 934 (9th Cir. 1993). If there is any doubt that a right to removal exists, ambiguities are to be construed against removal. *Delgado v. Shell Oil Co.*, 890 F.Supp. 1324, 1341 (S.D. Tex. 1995), *Mulcahey v. Columbia Organic Chemicals, Co.*, Inc., 29 F.3d 148, 151 (4th Cir. 1994), *Kenro, Inc.*, supra, 904 F.Supp. at 913, *Kluksdahl v. Muro Pharmaceutical, Inc.*, 886 F.Supp. 535, 537 (E.D. Va. 1995).

A petition for removal must be filed within 30 days of the receipt of the state court initial pleading or within 30 days "from which it may be ascertained" that the case is removable. 28 U.S.C. § 1442(b). Wright, Miller, and Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, Section 3732. (1998 Supp.).

Even if a federal question claim is joined with other nonremovable claims, the entire case is removable. *City of Chicago*, supra, 118 S.Ct. at 529 (federal question plus purely state administrative review); *Weimer v. City of Johnstown*, 931 F.Supp. 985, 988 (N.D. N.Y. 1996).[8]

The failure to timely file a notice of removal requires remand to the state court. *Rothwell v. Durbin*, 872 F.Supp. 880, 881 (D. Kan. 1994), *First Nat. Bank & Trust Co. in Great Bend v. Nicholas*, 768 F.Supp. 788, 790 (D. Kan. 1991),

Because removal implicates concerns of federalism, the combined effect of these various rules is that removal is not favored, should be denied if any doubt exists and the removing party has the

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[8] At the hearing, the Court acknowledged that GE could remove the case on the federal officer basis even if the enclave jurisdiction was in doubt because of a colorable uncertainty as to whether the exposures might have also occurred outside TAFB. "Under the enclave theory, he couldn't remove [if the exposures were not solely on a federal enclave]. Under federal officer he could."

burden of resolving any such doubts. As demonstrated below, the decision of the Circuit Court turns these justifiable rules on their head-the removing party can delay removing the case until it is absolutely certain of the basis of removability ("unequivocal notice") from pleadings in the state case even if its has indisputable knowledge of its own activities that gave it actual knowledge of the removability of the case many months before it filed its notice of removal.

Assuming *arguendo* that the original Petition alone did not provide GE "unequivocal notice" of its removability, where GE knew from its own activities that the Petition was removable, the thirty-day time limit under 28 U.S.C. § 1446(b) should begin to run.

## REASONS FOR GRANTING THE WRIT

### I. THE PETITION SHOULD BE GRANTED BECAUSE THE ISSUE PRESENTED BY THIS CASE IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THE COURT.

As in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, supra, the courts have treated the question of any steps necessary to ascertain the removability of a case in widely disparate fashion.

A long line of cases have addressed the impact of lack of diversity (i.e. citizenship) or jurisdictional amount allegations in an initial state pleading on the timeliness of removal, focusing on what duty, if any, a removing party has to go outside the pleading itself if the pleading is ambiguous as to removability.[9]

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[9] *See* Annot., *When Period for Filing Petition for Removal of Civil Action from State Court to Federal District Court Begins to Run*

### A. Cases Requiring Inquiry or Use of Knowledge Starting Removal Clock

One line of cases requires the defendant in a state suit to make inquiry or use the knowledge it has obtained to ascertain the removability of an otherwise "ambiguous" pleading.

For example, in *Kaneshiro v. North American Co. for Life and Health Ins.*, 496 F.Supp. 452, 496 (D.C. Hawaii 1980), the court, applying the removability rules outlined above, found that:

> Where the initial pleading is indeterminate, absent fraud by the plaintiff or pleadings that provide 'no clue' that the case is 'not removable', the burden is on the defendant desiring removal to scrutinize the case and to remove it in a timely fashion.[10]

Interpreting *Kaneshiro* to require that a petition for removal be filed within 30 days of receipt of any initial pleading "which does not on its face preclude removal", the court in *Blow v. Liberty Travel,*

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*under 28 U.S.C. § 1446(b)*, 16 A.L.R.Fed. 287, §§ 11 and 12 (Supp. 1998) and its superceding annotation, Annot, *When Does Period For Filing Petition For Removal Of Civil Action From State Court To Federal Court Begin To Run Under 28 USCS § 1446(b)*, 139 ALR Fed 331, § 8 (1998). These annotations gather cases relating to the effect of the defendant having information apart from the intial pleading on the time for removal and demonstrates that both removing parties and parties resisting removal lack clear guidelines.

[10] *See also* additional cases cited in § 8(b), Annot., supra, 139 ALR Fed 331, 398-403.

*Inc.*, 550 F.Supp. 375, 376 (D.C. Pa. 1982), again placed the burden on the removing party to ascertain the citizenship of plaintiffs that had alleged they were residents of Pennsylvania.

Citing *Kaneshiro*, the court in *Kanter & Eisenberg v. Madison Associates*, 602 F.Supp. 798, 801 (D.C. Ill. 1985), remanded for untimely removal, finding that the removing party failed to take adequate steps to ascertain the existence of diversity.[11] In *Knudsen v. Samuels*, 715 F.Supp. 1505 (D.Kan. 1989) the court held that the defendant's knowledge of its own citizenship required the defendant to commence removal even if the initial pleading alleged defendant's state of citizenship. (*see Keller v. Carr*, 534 F.Supp. 100 (W.D. Ark. 1981 to same effect).

In the somewhat related issue of vague allegations in the state court pleading, in *Scott v. Greiner*, 858 F.Supp. 607, 610, n. 2 (S.D. W.Va. 1994) the court determined that the defendant was able to ascertain federal question jurisdiction sufficiently from the state complaint and could not wait for receipt of admissions even though the state pleading was vague. In *Golke v. Lee Lumber & Bldg. Materials Corp.*, 671 F.Supp. 568,571 (N.D. Ill. 1987), the court found the original petition "fairly stated a colorable claim for retaliatory discharge even though "arguably, inartfully pleaded" and could not say the defendant had "no clue". In *Golden Apple*

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[11] The court rejected the defendant's assertion that the earliest it could have known of the removability of the case was the deposition of one of the plaintiff five months after the state petition was filed. at 799. The court determined that the allegations of the petition provided sufficient information of the residency of the plaintiffs that could have been resolved by a simple phone call to plaintiffs' counsel. at 801.

*Management Co., Inc. v. GEAC Computers, Inc.*, 990 F.Supp. 1364 (M.D. Ala. 1998) the court found a settlement negotiation letter (treated as an "other paper") sufficiently informed the defendant that the thirty day removal period was triggered.

For jurisdictional amount, the removing party has the burden of proving by a preponderance of the evidence that the amount in controversy exceeded $50,000. *Laughlin*, supra, 994 F.2d at 873, *Gafford v. General Electric Co.*, 997 F.2d 150, 157-60 (6th Cir. 1993), *Barber*, supra, 935 F.Supp. at 1190-91.[12]

Similarly concentrating on whether the pleading allows the defendant to "intelligently ascertain removability" are cases determining whether certain state-authorized pleadings or the practice of "courtesy-copy" triggers the thirty day removal period-the issue now pending before the court in *Murphy Bros., Inc*, supra.

### B. Cases Limiting Starting of Removal Clock to Pleadings

Another line of cases flatly decline to require the defendant to inquire into grounds for removal (usually, citizenship, amount or federal question) or to charge the defendant with its own knowledge in starting the time limit for removal.

For example, in *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 162-63, reh, en banc, den, 976 F.2d 774 (5th Cir. 1992), cert

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[12] In *Barber*, the court specifically rejected the argument that the removing defendant ought to be able to await the response to a request for admission to establish the amount in controversy. at 1191, n. 3.

den, 507 US 967 (1993), the court declined to consider matters known to the defendant or that the defendant could have known through investigation. Similarly, in *Smith v. Bally's Holiday*, 843 F.Supp. 1451, 1453 (N.D. Ga. 1994) the court restricted the jurisdictional amount issue to the plaintiff's state court pleading. Also, *Pack v. AC & S, Inc.*, 838 F.Supp. 1099, 1101 (D.Md. 1993), a case relied upon by the District Court (App. A-17), held only a paper generated in the state litigation would suffice to start the removal period. In the two annotations above-cited, there are additional cases which interpret § 1442 to be limited to matters within the pleadings.

### C. The Importance of the Question Presented

As in the *Murphy Bros.* case now pending before the court[13], this case presents an issue of exceptional importance to litigants and their counsel not previously presented to the Court, in part, because of the procedural roadblocks that exist to the review of many removal issues. *See* 28 U.S.C. § 1447(d), *Things Remembered v. Petrarca*, 516 U.S. 124, 127 (1995). The opportunities for this court to review removal matters have been rare and this is apparently the first time for the court to review the issue of the knowledge of the removing party as impacting on the starting of the time for removal. The Court should seize this opportunity to review this issue and exercise it supervisory jurisdiction in order to provide much needed guidance to the lower courts, litigants and their counsel on this issue and resolve any uncertainty as to the calculation of removal time.

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[13] **see** Petition for Writ of Certiorari at 15-17.

## CONCLUSION

In summary, if the Court of Appeals' decision is allowed to stand, a party may wait many months while state court litigation proceeds apace (even allowing other co-defendants to carry the defense burden) to remove the case to federal court to start anew, despite indisputably having knowledge that the case was always removable. Given the thousands of cases removed annually, in conjunction with the certiorari granted in Murphy Bros., the Court can establish guidelines for the parties and the courts to follow.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

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| JAMES E. AKIN, | § |
| ET AL. | § |
| Plaintiffs, | § |
| | § |
| VS. | § NO. 1:93-CV-0382 |
| | § |
| BIG THREE INDUSTRIES, | § |
| INC., ET AL., | § |
| | § |
| Defendants. | § |

MEMORANDUM OPINION AND ORDER DENYING
PLAINTIFFS' MOTION TO REMAND AND
GRANTING DEFENDANTS' MOTION
TO TRANSFER VENUE

Pending before the court are the following motions: (1) Plaintiffs' Motion to Remand and (2) Defendants' Motion to Transfer Venue. The court, having considered the briefs and arguments of counsel, is of the opinion that the Plaintiffs' Motion to Remand should be DENIED and the Defendants' Motion to Transfer Venue should be GRANTED.

## I. BACKGROUND

This toxic tort case arises out of alleged chemical exposure at Tinker Air Force Base in Oklahoma City, Oklahoma. Approximately two hundred Tinker employees brought negligence and strict products liability claims against various corporate manufacturers. Plaintiffs allege multiple adverse health affects resulting from work performed on jet engines manufactured for the United States Air Force.

On November 13, 1992, plaintiffs filed a state court suit in Beaumont, Texas. The pleadings alleged "[p]laintiffs would show that all Plaintiffs were exposed to hazardous chemicals, including, but not limited to cobalt, chromium, cadmium, acetylene, ethanol and heptane while working for the United States Air Force at Tinker Air Force Base in Oklahoma City, Oklahoma." The plaintiffs further alleged "[e]ach plaintiff. . . was exposed to the dust and fumes of the jet engine and jet engine parts" and that "plaintiffs were also exposed to numerous other hazardous chemicals while working at the air force base." Plaintiffs' first, second, and third amended petitions made similar allegations.

During discovery, defendants sent interrogatories to plaintiffs. This discovery sought evidence regarding the precise location of each exposure and the extent to which the plaintiffs performed their duties "on base." The interrogatories also sought information regarding the types of chemicals to which plaintiffs were exposed. In addition, the defendants-requested information about any adverse health effects which were caused by materials worked with at Tinker.

On July 16, 1993, the plaintiffs served responses to the

interrogatories. With respect to questions inquiring where the various plaintiffs performed their duties, each response stated "all duties were performed on base." (See, e.g., Plaintiff James E. Akin's Answers to Interrogatories, Interrogatory No. 32). Additionally, the responses identified various chemicals to which each plaintiff was exposed. (See id., Interrogatory No. 5). Finally, the plaintiffs identified the health problems, if any, caused by substances worked with at Tinker. (*See id.*, Interrogatory No. 12).

On August 13, 1993, Defendant General Electric Company (GE), joined by all other defendants, removed the case to this court. The notice of removal asserted two bases for federal Question jurisdiction: (1) the alleged exposures occurred on a federal enclave, and (2) GE was a person acting under a federal officer. Simultaneously, defendants moved to transfer venue to the Western District of Oklahoma on the grounds that it is a more convenient forum in which to litigate. In opposition, plaintiffs moved to remand, Asserting (1) federal question jurisdiction does not exist and (2) the removal was untimely.

## II. PLAINTIFFS' MOTION TO REMAND

The Court first considers plaintiffs' motion to remand. Resolution of the motion requires the court to delve into issues of federal enclave jurisdiction, federal officer removal, and timeliness of removal. Addressing the issues in that order, the Court will first determine whether federal enclave jurisdiction is present.

### A. Federal Enclave Jurisdiction

The Fifth Circuit described the nature of federal enclave jurisdiction in *Mater* v. Holley, 200 F.2d 123 (5th Cir. 1952). *Mater*

involved a personal injury sustained at Fort McPherson, Georgia. The plaintiff originally brought a negligence claim in federal district court, but her suit was dismissed by that court for lack of subject matter jurisdiction.

On appeal, the Fifth Circuit reversed. That court noted that as a Constitutional matter, the Congress had exclusive legislative power over "all Places purchased by the consent of the legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. CONST. Art. I, § 8, cl. 17. The Court reasoned that any law existing in territory over which the United States has exclusive sovereignty must derive its authority and force from the United States and is for that reason federal law. *Mater*, 200 F.2d at 124. The Court held that the district court had federal question jurisdiction over the case because it "would be incongruous to hold that although the United States has exclusive sovereignty in the area here involved, its courts are without power to adjudicate controversies arising there. . . ." *Id.*

James Madison proposed the idea of granting Congress exclusive legislative powers over land purchased for the public benefit. *See generally* Capt. Richard T. Altieri, *Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation*, 72 MIL. L. REV. 55, 59 (1976). The Constitutional clause prevents state legislative interference with publiclands. Similarly, *Mater's* conclusion that there should be a federal forum in which to litigate controversies arising on such lands prevents state judicial interference with matters likely to involve substantial federal interests.

The present conflict presents a compelling argument for a

holding that federal enclave jurisdiction exists over the tort claims. The United States Air Force is entrusted with this nation's defense. The Air Force entreated plaintiffs to perform important maintenance tasks on jet engines. All plaintiffs performed all duties on Tinker Air Force Base. And the plaintiffs now claim that these very duties--repairing jet engines--resulted in personal injuries. As a result, this court holds that in a toxic exposure case such as this, when the plaintiffs' claims arise out of exposure to chemicals on base in furtherance of their employment duties, enclave jurisdiction is properly invoked. The result of this holding is that the case presents a question arising under federal law, 28 U.S.C. § 1331, and is removable under 28 U.S.C. § 1441(a).[1]

**B. Federal officer Removal Jurisdiction**

GE also argues that, even if federal enclave jurisdiction is not present, it is entitled to remove under 28 U.S.C. § 1442 (a) (1). That section allows federal officers or persons acting under them to remove a case provided certain requirements are met. First, since GE is not a federal officer, it must be a "Person" within the meaning of 28 U.S.C. § 1442(a)(1). Second, GE must assert a colorable claim to a federal defense. Third, GE must show that it is being sued for acts taken "under color of" or at the direction of the federal officer.

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[1] Plaintiffs' argument that state courts have concurrent jurisdiction over transitory tort actions misses the point. Whether the state court's jurisdiction is concurrent is irrelevant to the issue whether a federal question is presented. Many federal questions may be heard concurrently in a federal system. The removal statutes permit a defendant to exercise the option of having a federal question decided by a United States court.

1. **Is GE a "'person" as contemplated by 28 U.S.C. § 1442(a)(1)?**

The first question is whether GE, as a corporation, is a "Person" as that term is contemplated by 28 U.S.C. § 1442(a)(1).

The Fifth Circuit spoke to this issue in *Peterson v. Blue Cross/Blue Shield of Texas*, 508 F.2d 55 (5th Cir. 1975). *Peterson* involved a malicious prosecution case brought by a physician against corporate defendants for his alleged wrongful suspension under the Medicare program. *Peterson*, 508 F.2d at 57. The defendants removed the case under § 1442(a)(l) alleging federal officer removal jurisdiction. The court stated that "[i]t is indisputable that each of the defendants was either an 'officer of the United States or an agency thereof, or person acting under him.'" *Id.* (emphasis added). *Peterson*, therefore, suggests that the term "person" encompasses more than just natural persons.[2] Many district courts have also concluded that 'person', as used in § 1442(a)(1) includes corporations. See *Pack v. AC and S, Inc.*, 838 F.Supp. 1099, 1102 (D.Md. 1993); *Fung v. Abex Corp.*, 816 F.Supp. 569, 572 (N.D.Cal. 1992); *Ryan v. Dow Chemical Co.*, 781 F.Supp. 934, 946 (E.D.N.Y. 1992).

Plaintiffs' reliance on *International Primate Protection League v. Administrators of Tulane Educ. Fund*, _ U.S. _ , 111 S.Ct. 1700 (1991) is misplaced. *International Primate* simply holds that a federal agency is not entitled to remove under § 1442 (a)(1).

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[2] See also 1 U.S.C. § 1 (instructing that when construing Congressional acts, unless context indicates otherwise, "person" includes corporations).

That case does not apply for two reasons: First, GE is not a federal agency. Second, GE asserts it acted under the Secretary of the Air Force and not under the direction of any federal agency. In accordance with the great weight of authority, the Court therefore holds that GE is a person within the meaning of 28 U.S.C. § 1442(a)(1).

2. **Can GE assert a colorable claim to a federal defense?**

To remove as a federal officer, GE must assert a colorable claim to a federal defense. *Mesa v. California*, 489 U.S. 121 (1989). The purpose for this requirement is to ensure that the federal district court is passing on a question of federal law. In other words, assertion of the federal defense provides federal question jurisdiction which makes the case suitably removable. Therefore, the defendant removing under the federal officer statute is not bound by the well-pleaded complaint rule which ordinarily governs whether the case presents a federal question. *Mesa*, 489 U.S. 136-37.

GE argues it has a colorable claim to the government contractor defense set forth in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1987). In *Boyle*, the Supreme Court held that liability fordesign defects in military equipment cannot by imposed under state law if:

1. The United States approved reasonably precise specifications;

2. The equipment conformed to those specifications; and

3. The supplier warned the United States about the dangers in the use of the equipment.

*Boyle*, 487 U.S. at 512.

In opposition to the motion to remand, GE submits the Affidavit of Dempsey L. Hodges, manager of GE's Midwest City Office. Hodges states that GE manufactured the jet engines repaired at Tinker under contract with the Secretary of the Air Force or his delegee. According to Hodges, GE manufactured the engines pursuant to specifications set by the Air Force.

Although GE might or might not ultimately prevail on its government contractor defense, that issue is beside the point. All that is required under § 1442 (a) (1), as interpreted by *Mesa*, is that GE assert a colorable claim to the defense. Any determination as to the merits is collateral to the jurisdictional question here presented. The court, therefore, holds that GE has set up a colorable claim to the government contractor defense set forth by *Boyle*.

3. **In GE being sued for actions taken "under" or at the direction of a federal officer?**

Finally, GE must establish a nexus between the acts it performed at the direction of the Secretary of the Air Force and the present claims for relief. Many courts have concluded that removal is proper when the lawsuit arises out of actions taken by a government contractor at the direction of a federal officer. See, e.g., *Pack v. AC and S Inc.*, 838 F.Supp. 1099, 1103 (D.Md. 1993); *Fung v. Abex Corp.*, 816 F.Supp. 569 (N.D.Cal. 1992); *Gulati v. Zuckerman*, 723 F.Supp. 353 (E.D.Pa. 1989). For example, in *Pack*, the court considered whether Westinghouse, a government contractor, acted sufficiently at the direction of the Navy when manufacturing turbine generators. The court concluded that Westinghouse satisfied the "acting under" requirement of § 1442(a)(1). *Pack*, 838 F.Supp.

at 1103.

The same rationale applies here. The plaintiffs's discovery responses indicated that certain chemicals had caused adverse health effects. The chemicals were emitted during the repair of GE's jet engines. The repair involved grinding engine parts manufactured by GE. Plainly, when a government contractor builds a product pursuant to Air Force specifications and is later sued because compliance with those specifications allegedly causes personal injuries, the nexus requirement is satisfied. GE, therefore, acted under a federal officer and has satisfied each of the requirements necessary to assert federal officer removal jurisdiction under 28 U.S.C. § 1441(a)(1).

**C. Timeliness of Removal Under 28 U.S.C. § 1446(b)**

The final question is whether the defendants timely removed this case under 28 U.S.C. § 1446(b). That section requires that the notice of removal be filed within thirty days after the receipt by the defendants, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action is based. 28 U.S.C. § 1446(b). However, an exception applies if the case stated by the initial pleading is not removable--the notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. 28 U.S.C. 5 1446(b). This exception to the general rule serves the laudable purpose of preventing the defendant from having to speculate whether a case is removable. It also functions as a deterrent to the plaintiff seeking to disguise the true federal character of a

claim.[3]

The Fifth Circuit applied this exception in *Burks v. Amerada Hess Corp.*, 8 F.3d 301 (5th Cir. 1993). *Burks* involved a case which the defendants removed on the grounds that ERISA completely preempted certain of the plaintiff's state law claims. The plaintiff's original pleadings alleged that wrongful termination caused the plaintiff to lose "benefits." An amended pleading alleged the denial of benefits caused the plaintiff to suffer emotional distress. The defendants removed within thirty days after they received the amended pleading. In opposition to the removal, the plaintiff argued that his initial pleading triggered the thirty day clock and the removal, outside this period, was untimely. The Fifth Circuit reasoned that the case stated by the initial pleading was not removable because a claim that wrongful termination resulted in a loss of benefits was not completely preempted by ERISA. The rule derived from the case is that the thirty day period announced in § 1446(b) does not begin to run from an original pleading that does not specifically state a removable claim. Rather, the defendant has thirty days from the date he is on notice via receipt of a subsequent document indicating that the case is or has become removable. The issue in the present case is more complicated than that in *Burks* because the defendants rely in part on enclave jurisdiction to sustain removal. Unlike other federal question cases, whether the present pleadings set forth a removable case is not determined by reference to ordinary causes of action and elements thereof. The typical case simply involves an examination of the pleadings to determine whether the rights asserted are federal

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[3] The court in no way suggests the plaintiffs in the present case engaged in any such conduct.

rights set forth by the Constitution or Acts of Congress. Quite to the contrary, in enclave jurisdiction, the determinative fact is the precise location of the events giving rise to the claims for relief. It is only when the-geography is mapped in a certain way that an otherwise state claim presents a federal question.

The defendants maintain they timely removed within thirty days after having received discovery responses revealing the exact location the chemical exposures in fact occurred. The plaintiffs strongly disagree, arguing that their original and amended pleadings placed the defendants on notice that the case was removable. According to plaintiffs, the time to remove was not tolled because the initial pleading stated a removable case. As noted at the outset, the original petition states in relevant parts: "[p]laintiffs would show that all Plaintiffs were exposed to hazardous chemicals, including, but not limited to cobalt, chromium, cadmium, acetylene, ethanol and heptane while working for the United States Air Force at Tinker Air Force Base in Oklahoma City, Oklahoma." The plaintiffs further alleged "[e]ach plaintiff was exposed to the dust and fumes of the jet engine and jet engine parts" and that "plaintiffs were also exposed to numerous other hazardous chemicals while working at the air force base." Plaintiffs, amended petitions contained similar allegations.

The Court holds that the state court pleadings are subject to two reasonable constructions and are, therefore, ambiguous. One construction, advanced by plaintiffs, is that the phrase "while working for the United States Air Force at Tinker Air Force Base", is a *geographical* modifier, referring to the location of the exposures. The other, advanced by defendants, is that the entire phrase is a *durational* modifier, describing the time period in which the exposures occurred. Regardless of which construction is more plausible, they are both reasonable. At the hearing on this matter,

plaintiffs sought to dispel the defendants' construction as unreasonable. However, the duration of the exposures is highly relevant to a defendant any time it reviews a toxic tort pleading because of its significance as to limitations periods. Further, the exposure period is relevant as to causation and the extent of injury. Finally, the length of exposure time is relevant insofar as it might absolve a defendant which made few or no product sales during a given period. In addition, as defendants point out, the pleadings do not exclude the possibility that some or all plaintiffs claimed injury due to exposures occurring off-base. Had some exposure occurred off-base, the defendants burden of establishing enclave jurisdiction would have been heavier.[4]

The court, therefore, holds that the pleadings are ambiguous and the thirty days set forth in 28 U.S.C. S 1446(b) were tolled until the defendants received sufficient notice of removability via receipt of an "other paper". *See Pack v. AC and S, Inc.*, 838 F.Supp. 1099, 1101-02 (D.Md. 1993) (holding that when initial pleading required defendant to guess as to removability, such pleading is insufficient to trigger thirty day limit). This holding advances both policies behind § 1446(b)--the defendants should not have to speculate as to removability, and plaintiffs should not be encouraged to draft pleadings with an eye toward insulating federal cases from removal.

The discovery responses received by the defendants without doubt provided notice that the case was removable. Defendants

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[4] When exposures allegedly occur partially inside and partially outside the boundaries of an enclave an argument would surface that the state"s interest increases proportionally, while the federal interest decreases.

correctly point out that many courts have held that discovery responses can serve as "other papers" within the meaning of §1446(b). See, e.g., Chapman -18, *Powermatic, Inc.*, 969 F.2d 160, 164 (5th Cir. 1992), cert. denied, _ U.S. _, 113 S.Ct. 1402 (1993), *Johnson v. Dillard Department Stores, Inc.*, 836 F.Supp. 390, 391 (N.D.Tex. 1993); *Pack*, 838 F.Supp. at 1101-02; *Jong v. General Motors Corp.*, 359 F.Supp. 223, 226 (N.D.Cal. 1973). The interrogatory answers informed the defendants that all plaintiffs performed all duties on Tinker Air Force Base, and all claimed chemical exposure occurred while plaintiffs performed these duties. These papers precisely identified the location of the claimed exposures, which is the singularly relevant fact when Determining the applicability of enclave jurisdiction. As such, the defendants were required to remove within thirty days from Receipt of these responses. Defendants have done just that. The court concludes the removal was timely under § 1446(b).[5]

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[5] For the same reasons discussed above, federal officer removal was timely. The responses provided GE with notice that certain products manufactured by GE caused plaintiffs' injuries. Thus, the discovery adequately notified GE of the required nexus between its manufacturing process and the claimed injuries. *See Pack v. AC and S, Inc.*, 838 F.Supp. 1099, 1102 (D.Md. 1993). The court notes, however, that the principal dispute at the hearing on this matter was whether GE timely asserted federal enclave jurisdiction.

Moreover, plaintiffs, waiver argument is unsound. Plaintiffs argue that because defendant Chemical Specialists and Development, Inc. filed a motion for summary judgment in state court, this resulted in a waiver of the right to remove. Waiver is the voluntary relinquishment of a known right. Because the court has concluded

For the above reasons, the plaintiffs' motion to remand is DENIED.

## III. DEFENDANTS' MOTION TO TRANSFER VENUE

Defendants move to transfer venue to the Western District of Oklahoma. Given that the court has denied the motion to remand, transfer is appropriate under 28 U.S.C. § 1404. That section allows for discretionary transfer of cases for the convenience of the parties and witnesses and in the interest of justice. 28 U.S.C. § 1404(a).

It is a rare case that more aptly illustrates the policies driving § 1404. None of the plaintiffs resides in the Eastern (or any other) District of Texas. All of the alleged exposure occurred in Oklahoma City, Oklahoma. The defendants allegedly delivered their products to Tinker Air Force Base, located in Oklahoma City. The Plaintiffs are Oklahoma residents. The only connections to Beaumont are lawyers representing the parties. Having weighed the above factors relevant under § 1404(a), the Court concludes that this case should be transferred to the Western District of Oklahoma.

The defendants, motion to transfer venue to the Western District of Oklahoma is hereby GRANTED. The Clerk of the Court is hereby ORDERED to forward the file of this matter to the Clerk

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the case was not removable until plaintiffs served discovery responses, the defendants did not possess the removal option at the time Chemical Specialists filed its motion for summary judgment. Chemical Specialists' actions could not waive a right which had not yet accrued. Therefore, the court holds no waiver occurred.

of the Court for the Western District of Oklahoma.

ORDERED, ADJUDGED, and DECREED that Plaintiff 's Motion to Remand is DENIED. It is further ORDERED, ADJUDGED, and DECREED that Defendant's Motion to Transfer Venue to the Western District of Oklahoma is GRANTED. It is further ORDERED that decision on any other pending motions is deferred to the court in the Western Division of Oklahoma to which this case is assigned.

SIGNED this the 31st day of March, 1994.

/s/
HOWELL COBB
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

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| JAMES E. AKIN, | § |
| ET AL. | § |
| Plaintiffs, | § |
| | § |
| VS. | § NO. 1:93-CV-0382 |
| | § |
| BIG THREE INDUSTRIES, | § |
| INC., ET AL., | § |
| | § |
| Defendants. | § |

ORDER

For the reasons set forth in the court's memorandum opinion, it is ORDERED that the plaintiffs' motion to remand is DENIED. The defendants' motion to transfer venue to the Western District of Oklahoma is GRANTED. The Clerk of Court is ORDERED to deliver the file to the Clerk of Court for the Western District of Oklahoma. Rulings on all other pending motions are DEFERRED to the Court of the Western District of Oklahoma to which this case is reassigned.

SIGNED this the 31st day of March, 1994.

/s/
HOWELL COBB
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

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| JAMES E. AKIN, | § | |
| ET AL. | § | |
| Plaintiffs, | § | |
| | § | |
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| | § | |
| BIG THREE INDUSTRIES, | § | |
| INC., ET AL., | § | |
| | § | |
| Defendants. | § | |

ORDER

Pending before the court are the following motions: (1) Plaintiffs' Motion to Reconsider and (2) Plaintiffs' Motion to Attach Additional Exhibits.

This court issued its memorandum opinion and order on March 21, 1994. On March 31, 1994, plaintiffs filed their motion to reconsider. Inadvertently omitted from that motion was a copy of an arbitration award which, according to plaintiffs, deprives the court of federal officer removal jurisdiction because it suggests the United States government was never warned about potentially hazardous products manufactured by General Electric.

The motion for leave to attach this exhibit is GRANTED. The court will now address the plaintiffs' motion for reconsideration.

The motion for reconsideration essentially rehashes the same basic arguments offered by plaintiffs at the hearing on this matter and in the briefing. The court has very carefully considered the law in this area and remains of the opinion that its earlier opinion was correct. The motion to reconsider is therefore DENIED, with one caveat: the court's earlier memorandum opinion deferred ruling on all pending motions to the court sitting for the Western District of Oklahoma. One of these motions was filed by General Electric for leave to file a third party action against the United States of America. This motion is GRANTED. Rulings on any remaining motions is DEFERRED to the court sitting for the Western District of Oklahoma. The clerk is again ORDERED to transfer the file in this cause to the Clerk of Court for the Western District of Oklahoma. All future filings in this matter are to be made with the Clerk of Court for the Western District of Oklahoma.

SIGNED this the 9th day of May, 1994.

/S/
HOWELL COBB
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

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| JAMES E. AKIN, et al., | ) | |
| Plaintiffs, | ) | |
| vs. | ) | No. CIV-94-832-C |
| BIG THREE INDUSTRIES, INC., et al., | ) | |
| Defendants. | ) | |

ORDER

This matter is before the Court for consideration of plaintiffs' motion to remand. Having reviewed the pleadings, the Court finds plaintiffs' motion is untimely, previous rulings made in this case are correct and on this issue constitute the law of this case, and, in any

event, the denial of the motion to remand was not clearly erroneous or manifestly unjust.

IT IS THEREFORE ORDERED that plaintiffs' motion to remand is hereby DENIED.

IT IS SO ORDERED this 12 day of August, 1994.

/s/
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

James E. AKIN; Richard G. Arellano; Charles L. Baldwin; Annie M. Barnes; Terry D. Blain; Marcia Bannock; Delton E.Brown; Timothy L. Caraway; Thomas W. Clark; Richard Cotey; Connie Cottrell; Ronnie D. Cottrell; Steven L. Coy; Hugh Crow; Nathan D'Amico; Donna M. Davis; Louis R. Dickinson; Ollie Dillishaw, Jr.; Danny L. Dunn; Jenny L. Duren; Bill R.Durington; Steven Ray Duty; Leon Ealon; Debra M. Emerich; Janette K. Farley; Jon G. Gabbard; Linda D. Gatewood; Max R.Glover; Wendell P. Gomez; Eric L. Janousek; David Keiser; Larry D. Lidell; Robert C. Love; Jack L. Manning; Thomas Marshall; Michael D. Mowles; Jeffrey Murray; Melvin E.Norton; Zenephor Overstreet; James M. Owen; Terry W. Oxley; Ronald K. Peoples; Michael Phillips; Marie L. Plumlee; Phillip Plumlee; Rick Reames; Jack D. Rhoden; Wayne Richardson; Norma Roberts; Charlon S. Rogers; Sandra Rolland; Marlys Rone; Judy A. Rowland; Tony E. Ruble; ReathaR. Schlegel; Gloria Shelton, as representative of the estate of Wilton F. Shelton, deceased; Charlie Sheppard; Herman D.Sikes; William D. Slattery; Clayton D. Statsny; Melissa C.Statsny; Gayla S. Staton; Martha J. Storozyszyn; Rick L.Stuart; Mike Sullivan; Emmett Thomas, Jr.; Benjamin Tingle; Marilyn J. Tracey; Helen Walker; Randy F. Wiens; Leonard Williams; Leonard Williams; Morten D. Williams; Glenda Wright; Herman Dale Wright; Kenneth L. Wright; Albert A. Wyatt; James D. Wyatt; Johnnie R. York; Larry N. Smith; Danny Driskill; Gerald Houston,

Plaintiffs--Appellants,

V.

ASHLAND CHEMICAL COMPANY; Dow Chemical Company; McGean-Rohco, Inc.; Thunderbird Sales Company, Inc.,

Defendants--Appellees,

and

E.I. DUPONT DE NEMOURS & CO.; General Electric Company; J.W. Harris Co., Inc; Metallurgical Technologies, Inc.; Ashland Oil; Spray on Systems, Inc.; Plaze, Inc.; Royal Lubricants Company, Inc.; Stetco Inc.; Thompson & Formby, Inc.; L & F Products, Inc.; Miniwax Company, Inc.; Dow Industrial Service of the Dow Chemical Co.; Dowell Division of the Dow Chemical Co. & Brasos Oil & Gas Division of the Dow Chemical Co., Dow Industrial Service of the Dow Chemical Company; Dow Division of the Dow Chemical Company; Brazos Oil & Gas of the Dow Chemical Company; 3M Company; Minnesota Mining and Manufacturing Corporation; Diamond Shamrock Corporation; Diamond Shamrock Corporation, aka Occidental Electro-Chemicals Inc.; Allied Corporation; Allied Signal, Inc.; Exxon Corporation; Exxon Chemical; Mobil Oil Corporation; Ameron, Inc.; Blazer East, Inc., formerly know as Koppers Company, Inc.; Saral Protective Coatings Co.; Seymour of Sycamore, Inc.; Dexter Corporation; Uni-Kem International, Inc.; Miller-Stephenson Chemical Company, Inc., formerly known as Miller-Stephenson Company of Conn, Inc.; Cabot Corporation; Borden, Inc.; Phipps Products, a Division of Dow Chemical Company; Desoto, Inc.

Defendants,

V.

GENERAL ELECTRIC COMPANY,

Third-Party-Plaintiff,

V.

UNITED STATES of America,

Third-Party-Defendant.

No. 97-6030.

United States Court of Appeals, Tenth Circuit.
Aug. 31, 1998.
Appeal from the United States District
Court for the Western District of Oklahoma (D.C. No.
Civ-94-832-C).

Before TACHA and BALDOCK, Circuit Judges, and GREENE, District Judge.(FN)

BACKGROUND

On November 13, 1992, plaintiffs filed this toxic tort case in state court at Beaumont, Texas. After receipt of answers to interrogatories, defendant General Electric (GE) removed the case to the United States District Court for the Eastern District of Texas. The Texas district court judge upheld removal jurisdiction, denied plaintiffs' motion to remand and transferred venue to the Western District of Oklahoma as a more convenient forum. The Oklahoma district court judge granted summary judgment in favor of defendants.

(FN) The Honorable J. Thomas Green, Senior United States District Judge for the District of Utah, sitting by designation.

Plaintiffs appealed, arguing that removal was untimely and summary judgment unwarranted.

## STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). We review a grant of summary judgment de novo, applying the same standard as the district court. See *Wolf v. Prudential Ins. Co. of Am.*, 50 F. 3d 793, 796 (10th Cir. 1995). "[We] examine the record to determine whether any genuine issue of material fact was in dispute; if not, we determine [whether] the substantive law was correctly applied," and in so doing "we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing" the motion. *Applied Genetics Int'l, Inc. v. First Affiliated Sec. Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990).

However, "where the non moving party will bear the burden of proof at trial on a dispositive issue" that party must "go beyond the pleadings" and designate specific facts so as to "make a showing sufficient to establish the existence of an element essential to that party's case" in order to survive summary judgment. *Celotex*, 477 U.S. at 322, 324. A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See *Vitkus v. Beatrice Co.*, 11 F. 3d 1535, 1539 (10th Cir. 1993).

## DISCUSSION

1. REMOVABILITY TO FEDERAL COURT

-- Federal Enclave Jurisdiction

The United States has power and exclusive authority "in all Cases whatsoever ... over all places purchased" by the government "for the erection of "Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings," U.S. Const. art. I, § 8, cl. 17. Such places are "federal enclaves" within which the United States has exclusive jurisdiction. [1] Personal injury actions which arise from incidents occurring in federal enclaves may be removed to federal Court as a part of federal question jurisdiction. There is no dispute that Tinker Air Force Base at Oklahoma City, Oklahoma is such a federal enclave.

-- Federal Officer Removal

Plaintiffs argue that the removal petition was defective in that all co-defendants did not consent and join in the removal papers. In the case at bar, defendant GE removed the case based on its status as a "person acting under" a federal officer, as well as the status of Tinker Air Force Base as a federal enclave. Federal officer removal

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[1] The Constitutional language is that the Congress shall have power "[t]o exercise exclusive Legislation," see id., which has been construed to mean exclusive jurisdiction under 28 U.S.C. § 1331. See *Mater v. Holley*, 200 F.2d 123, 124-25 (5th Cir. 1952). Noting that the United States has exclusive sovereignty in enclave areas, the Fifth Circuit said that it "would be incongruous to hold that ... (courts of the United States) "are without power to adjudicate controversies arising" therein. Id. 124.

constitutes an exception to the general removal rule under 28 U.S.C. § 1441 and § 1446 which require all defendants to join in the removal petition. The exception is set forth at 28 U.S. C. § 1442(a)(1) which provides in part that:

(a) "A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof **or any officer (or any person acting under that officer)** of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office .....". (emphasis added).

This statutory exception allows a federal officer independently to remove a case to federal court even though that officer is only one of several named defendants. The Congressional policy permitting federal officer removal could easily be frustrated by simply joining non-federal defendants unwilling to remove if consent of co-defendant(s) were required. Thus in *Bradford v. Harding*, 284 F.2d 307, 310 (2d Cir. 1960), the Second circuit ruled that " [t]he 'general government' must be able to assure each of its officers that a federal forum will be available if he wishes it, whether others sued with him wish it or no." Likewise, in *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 F.2d 150, 152 (5th Cir.1965), the Fifth circuit held "it is settled that the filing of a petition for removal by a single federal officer removes the entire case to the federal court." In *Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co.*, 644 F. 2d 1310, 1315 (9th Cir. 1981), the Ninth circuit reasoned that "[s]ince the federal officer is the only one entitled to remove under § 1442, he

alone can remove without other defendants joining in the petition, and the entire case is removed to the federal court." In *City of Aurora v. Erwin*, this court noted the importance to the United States and the absolute nature of federal officer removal jurisdiction, quoting the Supreme Court that exercise of such jurisdiction "'should not be frustrated by a narrow, grudging interpretation.'", 706 F. 2d 295, 296 (10th Cir. 1983) (quoting *Arizona v. Manypenny*, 451 U.S. 232, 242, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981)). On the basis of the foregoing, we hold that G.E. properly removed the case to federal court without the consent of co-defendants.

-- Right to Remove Must be Clearly Determinable

The right to remove a case to federal court is determined from allegations set forth in the initial pleading, "or other paper from which it may first be **ascertained** that the case is one which is or has become removable . . ." 28 U.S.C. § 1446(b) (emphasis added).

Appellants argue that removal was untimely because the initial pleading provided defendants with all necessary information to ascertain removability.[2] Appellees argue that plaintiffs' allegations

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[2] In this regard, appellants rely on non-binding case law from other jurisdictions to the effect that where it is apparent that removal may be justified a duty is imposed upon movants to investigate potential reasons for removal. See *Scott v. Greiner*, 858 F.Supp. 607, 610 & n. 2 (S.D.W.Va.1994) (motion for more definite statement required where federal question jurisdiction cannot be ascertained from the complaint); *Golke v. Lee Lumber & Bldg. Materials Corp.*, 671 F. Supp. 568, 571 (N.D. 111. 1987) (inartfully pleaded complaint provided sufficient notice to start time running for

of injuries sustained "while working at" Tinker Air Force Base and "while working for" the United States were ambiguous.[3] The district judge in Texas ruled that the word "at" in the phrase "while working at" could serve as either a "geographical modifier" or a "durational modifier" (Order at 12, 13), and that only after receipt of "other paper"--in this case answers to interrogatories--were defendants provided sufficient notice that the conduct sued upon took place wholly within the enclave, and under federal direction.[4]

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removal); *Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249, 1256 (9th Cir. 1989) (inartfully pleaded complaint may provide sufficient notice for removal).

[3] The initial pleading could have been understood as referring to injuries sustained off Base but during the time frame plaintiffs were working on the Base and/or working for the government. Plaintiffs alleged that they were "exposed to hazardous chemicals, including, but not limited to cobalt, chromium, cadmium, acetylene, ethanol and heptane while working for the United States Air Force at Tinker Air Force Base in Oklahoma City, Oklahoma," and that they "were also exposed to numerous other hazardous chemicals **while working at** the air force base." Appellant's App. at 1, 5, 6 (emphasis added).

[4] Judge Cobb ruled that only after receipt of the Answers to Interrogatories were federal enclave and federal officer removal jurisdiction apparent. The court said:

> The interrogatory answers informed the defendants that all plaintiffs performed all duties on Tinker Air Force base, and all claimed chemical exposure

We agree that the initial pleading in this case was ambiguous in that it did not provide unequivocal notice of the right to remove, and that the first clear notice of removability was given in answer to an interrogatory.[5]

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> occurred while plaintiffs performed these duties. These papers precisely identified the location of the claimed exposures, which is the singularly relevant fact when determining the applicability of enclave jurisdiction. As such, the defendants were required to remove within thirty days from receipt of these responses. Defendants have done just that. The court concludes that removal was timely under § 1446(b).

*Akin v.. Big Three Indus., Inc.*, 851 F. Supp. 819, 825 (E. D. Tex. 1994). The court further stated that:

> For the same reasons discussed above, federal officer removal was timely. The responses provided GE with notice that certain products manufactured by GE caused plaintiffs' injuries. Thus, the discovery adequately notified GE of the required nexus between its manufacturing process and the claimed injuries.

Id. at 825 n. 5.

[5] In response to interrogatories, defendants learned that the chemical exposure only occurred within the confines of the Tinker Air Force Base in Oklahoma City, Oklahoma. Plaintiff Akin's

In *DeBry v. Transamerica Corp.*, 601 F. 2d 480, 489 (10th Cir. 1979), we held that " [i]f the statute is going to run, the notice ought to be unequivocal. It should not be one which may have a double design." We further ruled that "ascertained" as used in section 1446(b) means a statement that "should not be ambiguous" or one which "requires an extensive investigation to determine the truth." Id. at 490. *DeBry* is consistent with our prior ruling in *Ardison v. Villa*, 248 F. 2d 226 (10th Cir. 1957), in which we interpreted the predecessor provision of § 1446(b), holding that the key to determining the date from which the clock begins to run is when the defendant is able to "intelligently ascertain removability." Id. at 227. We disagree with cases from other jurisdictions which impose a duty to investigate and determine removability where the initial pleading indicates that the right to remove may exist. [6] Rather, this court requires clear and unequivocal notice from the pleading itself, or a subsequent "other paper" such as an answer to interrogatory.

-- Proceedings in State Court Before Removal

Plaintiffs contend that defendant Chemical Specialist was barred from consenting to removal because it had previously filed a motion for summary judgment in state court, which motion was pending when removal was granted, citing *Scholz v. RDV Sports, Inc.*, 821 F.Supp. 1469, 1471 (M.D.Fla.1993). That case is inapposite because actions in state court by defendant Chemical Specialist in this

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Response to Interrogatory 32 was that "all duties were performed base."

[6] See supra footnote 3.

case were taken before it was unequivocally apparent that the case was removable.[7] This court rules that a defendant who actively invokes the jurisdiction of the state court and interposes a defense in that forum is not barred from the right to removal in the absence of adequate notice of the right to remove.

Proceedings in Federal Court after Removal

After removal of the case to federal court and the motion to remand was denied, plaintiffs voluntarily amended their complaint, asserting a cause of action in federal court against defendants Dow Chemical, Ashland Chemical and McGean-Rohco, Inc. This court holds that plaintiffs cannot voluntarily invoke, and then disavow, federal jurisdiction. In *Bernstein v. Lind-Waldock & Co.*, the Seventh Circuit stated:

> But once [plaintiff] decided to take advantage of his involuntary presence in federal court to add a federal claim to his complaint he was bound to remain there. Otherwise he would be in a position where if he won his case on the merits in federal court he could claim to have raised the

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[7] In *Scholz*, the court held that filing motions and scheduling hearings on motions indicated an intent to litigate in state court, which resulted in waiver of the right to remove the case. However, plaintiff's claims included federal employment discrimination claims under Title VII, so that the right to remove was apparent from the face of the Complaint.

> federal question in his amended complaint voluntarily, and if he lost he could claim to have raised it involuntarily and to be entitled to start over in state court. He "cannot be permitted to invoke the jurisdiction of the federal court, and then disclaim it when he loses." (citations omitted).

see also *Barbara v. New York Stock Exch., Inc.*, 99 F. 3d 49 (2d Cir. 1996); *Tolton v. American Biodyne, Inc.*, 48 F. 3d 937 (6th Cir. 1995). In *Johnson v. Odeco Oil & Gas Co.*, 864 F. 2d 40 (5th Cir. 1989), an amendment in federal court after removal was found to constitute a waiver of later objection to removal. In the circumstances of this case, the amendment adding parties also amounted to a waiver of alleged defective removal.

## II WARNINGS CONCERNING HAZARDOUS MATERIALS NEED NOT BE PROVIDED TO "SOPHISTICATED" AND KNOWLEDGEABLE PURCHASERS

--State Law Applies in Failure to Warn Cases

This products liability action is premised on the manufacturer's failure to warn purchaser's employees of the danger of low level exposure to certain chemicals. We apply Oklahoma law in such cases. See *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510 (10th Cir.1996). We review the district court's interpretation of Oklahoma law de novo, see *Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991), and "as a matter of independent federal procedure we utilize the normal federal standards of appellate review to examine the district court's decision process." *Mid-America Pipeline Co. v. Lario Enters.*, 942 F. 2d 1519, 1524

(10th Cir. 1991).

-- Sophisticated Purchaser Defense

Plaintiffs contend that they were injured while cleaning jet engine parts due to low-level, chronic exposure to defendants' chemicals. Plaintiffs argue that defendants breached their duty to warn potential users of the dangerous propensities of these chemicals even though the chemicals supplied were not improperly manufactured or contaminated.

Under Oklahoma law, the general rule applies that chemicals will be considered defective only if the following three elements are satisfied: (1) the product was unreasonably dangerous; (2) there was a failure to warn of its dangerous characteristics; and (3) the failure to warn was the cause of the plaintiff's injury. See *Cunningham v. Charles Pfizer & Co.*, 532 P. 2d 1377 (Okla. 1975). But Oklahoma law authorizes an important exception to the second element of the general rule, namely that there is no duty to warn members of a profession against dangers generally known to members of that profession. Hence, in *Mayberry v. Akron Rubber Mach. Corp.*, the court said that "where the danger or potentiality of danger is known or should be known to the user, the duty (to warn) does not attach." 483 F.Supp. 407, 413 (N.D.Okla.1979) (citing *Berry v. Porsche Audi, Inc.*, 578 P.2d 1195 (Okla. 1978); *Nicholson v. Tacker*, 512 P.2d 156 (Okla. 1973)); see also *Davis v. Fox River Tractor Co.*, 518 F. 2d 481 (10th Cir.1975); *Marshall v. Ford Motor Co.*, 446 F.2d 712 (10th Cir.1971). --We read Oklahoma case law to impose no duty to warn a purchaser as knowledgeable as the United States Air Force of the potential dangers of low-level chemical exposure. Plaintiffs rely on the argument that the Air Force did not actually know of the risks involved in low-level chemical exposure. However,

Oklahoma law clearly imposes a "should have known" standard as well, applicable to "knowledgeable purchasers," *Mayberry*, 483 F. Supp. at 413. This is tantamount to the familiar "sophisticated purchaser defense" exception which is based upon the principles set forth in the Restatement (Second) of Torts.[8] This exception absolves suppliers of the duty to warn purchasers who are already aware or should be aware of the potential dangers. See *O'Neal v. Celanese Corp.*, 10 F.3d 249, 251-52 (4th Cir.1993); see also *Davis v. Avondale Indus.*, 975 F.2d 169, 171 (5th Cir.1992) (a manufacturer is not required to provide an adequate warning about his product when the user or handler of the product already knows or reasonably should be expected to know of the characteristics of the product that may cause damage and the danger of such characteristics.) In *Apperson v. E.I. du Pont de Nemours & Co.*, 41 F.3d 1103, 1108 (7th Cir. 1994), the Seventh Circuit stated: "a duty to warn arises only when there is unequal knowledge with respect to the risk of the harm."

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[8] One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) **has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition**, and (c) fails to exercise reasonable care to inform them of this dangerous condition of the facts which make it likely to be dangerous. Restatement (Second) of Torts § 388 (1965)(emphasis added).

Because of the wealth of research available, the ability of the Air Force to conduct studies, and its extremely knowledgeable staff, we find that the Air Force easily qualifies as a knowledgeable purchaser" that should have known the risks involved with low-level chemical exposure. Employees of the Air Force are also deemed to possess the necessary level of sophistication, so that defendants had no duty to warn the Air Force or its employees of the potential hazards. See *Mayberry*, 483 F.Supp. at 413.

Based upon the foregoing, this court concludes from uncontroverted evidence viewed in a light most favorable to the plaintiffs that the district court's decision granting defendants' Motion for Summary Judgment should be affirmed.

AFFIRMED.